Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	WT Docket No. 08-165
Petition for Declaratory Ruling to Clarify	)	
Provisions of Section 332(c)(7)(B) to Ensure	)	
Timely Siting Review and to Preempt under	)	
Section 253 State and Local Ordinances that	)	
Classify All Wireless Siting Proposals as	)	
Requiring a Variance	)	

COMMENTS OF THE VILLAGE OF NEW ALBANY, OHIO

I. Introduction

On July 11, 2008, the Wireless Association (hereinafter referred to as "CTIA") filed the above captioned Petition for Declaratory Ruling (hereinafter referred to as "Petition") requesting that the Federal Communications Commission ("Commission") clarify provisions of the Communications Act of 1934, as amended ("Communications Act") regarding state and local review of wireless facility siting applications. The Village of New Albany (hereinafter referred to as "New Albany"), an Ohio municipal corporation with zoning authority, by and through its attorneys, and pursuant to the Commission's rules, submits the following comments urging denial of CTIA's requests. New Albany urges denial of the CTIA requests, because, as is noted herein, the requests are without merit and without basis in law or fact.

II. New Albany Joins Prior Comments

New Albany joins in the Comments filed by the National Association of Telecommunications Officers and Advisors ("NATOA") filed in response to CTIA's Petition. Specifically, Section 253 of Title 47 of the United States Code does not apply to wireless tower

sitings. Rather, 47 U.S.C. § 332(c)(7)(B) governs wireless tower sitings to the exclusion of § 253. Under section 332(c)(7)(B)(i):

> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof -
>
> > (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
> >
> > (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services. Section 253 on the other hand provides that no local government may prohibit or effectively prohibit the provision of telecommunications services. The language in § 332 is specific to wireless service facilities, while § 253 address telecommunications generally.

Congress does not enact redundant code provisions. Further, the Supreme Court's ruling in *Morales v. Trans World Airlines, Inc.,* establishes that specific code sections supersede general code sections. 504 U.S. 374, 384-385 (1992). Section 332 is very specific as to the remedies and procedures to be followed with respect to wireless facility applications.

Section 332 (c)(7)(B)(v) provides that any person adversely affected by a local government's final action or failure to act may, within 30 days, file suit in any court of competent jurisdiction. The court must hear and decide the suit on an expedited basis. Further, any person adversely affected by local government act or failure to act that is inconsistent with clause 32(c)(7)(B)(iv) may petition the Commission for relief. The specifiVillage of these remedies shows that § 332 applies to wireless service facilities to the exclusion of § 253.

The Commission should also deny CTIA's Petition with respect to the request that the Commission should supply meaning to the phrase "failure to act." The Commission's authority to interpret language in the Communications Act of 1934 is limited to areas of ambiguity. "Failure to act" is not an ambiguous phrase. The word "failure" means the "omission of an occurrence or performance;" the word "act" means "to carry out or perform an activity." Taken

together, the phrase "failure to act" means to omit the performance of an activity. Contrary to CTIA's assertion, there is nothing vague or ambiguous about this statutory language which would entitle the Commission to issue a declaratory ruling on this topic.

In addition, Congress made it perfectly clear that the time frame for responding to applications for wireless facility sitings is determined by reference to the nature of the application. Section 332(c)(7)(B)(ii) provides that local governments act on requests "within a reasonable time period, taking into account the nature of the request." Therefore, even if ambiguity existed in the statute, the FCC would be acting outside its authority by mandating a fixed time period and imposing a remedy for violating that mandate, where Congress clearly intended fluidity.

III. New Albany Wireless Facility Siting Rules And Experiences

Chapter 1179 of the New Albany Codified Ordinances sets forth the application and review standards for new wireless facilities in New Albany. Chapter 1179 contains siting standards, including requirements for location and mounting of wireless facilities. Additionally, Chapter 1179 sets forth design standards for color, size and the screening of wireless facilities. Chapter 1179 contains New Albany's application process. In New Albany, all wireless facilities are permitted or conditional uses and must be submitted to the Planning Commission for review and approval.

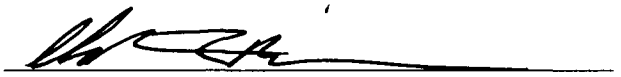
In the past five (5) years, five (5) applications for approval of wireless facilities have been filed in New Albany. Two (2) applications were for new towers and were both were approved within ninety (90) days of their filing. Three (3) applications were for collocation and each was approved within thirty (30) days of their filing.

IV. Conclusion

In conclusion, New Albany urges the Commission to deny CTIA's requests because federal statutes and regulations do not grant the Commission authority to issue the declaratory ruling requested by CTIA. Additionally, CTIA's requests are contrary to Congressional intent. Further, New Albany's wireless facilities ordinance sets forth an appropriate process for addressing land use applications and ensures that the rights of New Albany citizens to govern themselves and ensure the appropriate development of the community are properly balanced with the interests of all wireless facility applicants. New Albany's system works well and there is no evidence to suggest that the Commission should grant a special waiver of state and local law to the wireless industry. Any perceived difficulties experienced by wireless providers can be addressed through the electoral process or through a court of law.

Respectfully submitted,

SCHOTTENSTEIN ZOX & DUNN CO., LPA



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Certificate of Service

I certify that copies of the foregoing comments of the Village of New Albany, Ohio were submitted electronically to the Federal Communications Commission this 29th day of September 2008.

Andre T. Porter